

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
PHARMACY CASES LITIGATION)
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BEFORE: MAGISTRATE JUDGE JENNIFER C. BOAL

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 14
1 Courthouse Way
Boston, MA 02210

February 17, 2015
11:30 a.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter

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PROCEEDINGS

2 THE CLERK: All rise. You may be seated. Today is
3 February 17th, 2015, we're on the record in the matter of
4 New England Compounding Pharmacy, et al, Case Numbers
5 13-md-02419.

6 Counsel, please identify themselves for the record
7 starting with the plaintiffs' steering committee.

8 MS. JOHNSON: Good morning, your Honor,
9 Kristen Johnson for the plaintiffs' steering committee.

11:39AM 10 MR. FENNELL: Good morning, your Honor,
11 Patrick Fennell, plaintiffs' steering committee.

12 MS. MARTIN: Good morning, your Honor, Annika Martin
13 for the plaintiffs' steering committee.

14 MS. DOUGHERTY: Good morning, your Honor,
15 Kim Dougherty for the plaintiffs' steering committee.

16 THE COURT: Good morning.

17 MR. SCHRAMEK: Your Honor, Adam Schramek for the
18 St. Thomas entities.

19 MS. GREER: Marcy Greer for the St. Thomas entities.
11:39AM 20 Good morning.

21 THE COURT: Good morning.

22 MS. KELLY: Sara Kelly for the St. Thomas entities.

23 MR. BRACERAS: Roberto Braceras for Unifirst.

24 THE COURT: I understand that we have some people on
25 the phone.

1 MR. GASTEL: Yes, Judge Boal, this is Ben Gastel on
2 behalf of the plaintiffs' steering committee. I do apologize
3 for not being in the courtroom today. It was my intention of
4 being there, but there were no flights that left Nashville
5 yesterday, and I am stranded in my house today.

6 THE COURT: A familiar feeling to many of us here.
7 Is there anyone else on the phone?

8 MS. CARROLL: Yes.

9 THE CLERK: Can the parties on the line please
11:40AM 10 identify themselves for the record.

11 MS. PUIG: This is Yvonne Puig for St. Thomas
12 entities.

13 MR. DEAN: Richard Dean for Ameridose.

14 MR. LEE: Attorney Jason Lee for Specialty Surgery
15 in Nashville, Tennessee.

16 MR. TARDIO: Your Honor, this is Chris Tardio for
17 the Tennessee Clinic defendants.

18 MR. HOFFMAN: This is Eric Hoffman for the
19 St. Thomas entities.

11:40AM 20 THE COURT: All right. So I assume that's it for
21 people on the phone. So for the purposes of people on the
22 phone, I would just ask that people stay remain seated and
23 pull the microphones closer to them, and, obviously,
24 Mr. Braceras, we need to make some separate arrangements for
25 you if you wish to speak.

1 Let's start first with the motion for clarification.
2 I've read the parties' papers, and their positions seem
3 fairly well defined, so what I'd like to start to do is ask
4 the plaintiffs' steering committee to respond to St. Thomas'
5 proposal with respect to the first item, and this has to do
6 with releases for the tax returns.

7 As I understand it, St. Thomas has proposed -- well,
8 first they say there's no need for release, but they're fine
9 for not requesting, okay with not requesting release as long
11:41AM 10 as the plaintiffs agree that they would be barred from
11 seeking such relief in the future or the Court ordered as
12 such, so what is the PSC's response? Obviously, you all have
13 been talking about this for a long time.

14 MR. GASTEL: Yes, Judge, this is Ben Gastel on
15 behalf of the PSC. We do not oppose that approach. We do
16 believe that there should be a sort of opportunity for
17 plaintiffs who could demonstrate good cause as to a change in
18 circumstance that might necessitate bringing a new claim that
19 they didn't previously think that they had, that they should
11:42AM 20 be given an opportunity to demonstrate good cause in the
21 event that they'd like to amend their PTF to provide that
22 information and that sort of rare instance where that might
23 be appropriate.

24 Otherwise we do not propose, or, I'm sorry, we do
25 not oppose the path proposed by the St. Thomas entities on

1 that issue.

2 THE COURT: So, Mr. Gastel, just a follow-up
3 question on that, and the PSC has been diligent in pursuing
4 quick trials here and trying to push the Court as quickly as
5 it can, and it's appropriate to do so.

6 I mean, we're now two plus years after, if I'm
7 adding this up correctly, since the events. What would
8 change now in terms of a change in a claim for economic loss?

9 MR. GASTEL: Sure. I believe that the Court is
11:43AM 10 aware that some of the health issues that have been
11 associated with being injected with contaminated steriods
12 from NECC, not everybody else's health issue has fully
13 resolved, and as a result, there may be an instance, and I
14 will admit that it is probably rare that this will occur
15 where that sort of ongoing change in medical status might
16 give rise to a change in employment status, although that has
17 not been affected to date for a given plaintiff.

18 And in that sort of rare instance, we think that
19 that plaintiff should not be barred in the sense from
11:44AM 20 pursuing an economic loss that might have accrued after they
21 first filled out their plaintiff profile form.

22 THE COURT: All right. So, St. Thomas entities.

23 MR. SCHRAMEK: Your Honor, Adam Schramek for the
24 St. Thomas entities. We believe that any Court order at the
25 end of the day is subject to a minimum revision in the future

1 when good cause is brought and a motion brought to the Court
2 and explained. I don't think that we need to invite those
3 sorts of arguments by explicitly saying in the order there
4 could be exceptions in the future if in fact this really, you
5 know, exception to the exception actually occurs.

6 I think what I'm hearing Mr. Gastel say, and we've
7 spoken on this at length, is that in theory might be someone
8 that would be able to establish some sort of reason. I don't
9 think that that is a reason to put in the order that anyone
11:45AM 10 for good cause may get relief in the future.

11 If that circumstance occurs, he'll come to me, we'll
12 talk about it. You know, if we can't agree, we'll bring it
13 to the Court. I just don't think it requires an exception of
14 the order that says make your decision now, we're two years
15 in, talk to you about fungal meningitis or injections that
16 occurred two years ago, and at this point in time if you
17 don't want to produce your tax records, they can always hedge
18 their bets and just produce their tax records, but if they
19 don't want to produce them, then we'd simply ask for an order
11:45AM 20 that says, you know, you're made your decision, and you're
21 going to have to now live with that decision through the rest
22 of the litigation, particularly given the fact that the
23 aggressive nature of these trial settings the PSC is pushing
24 for.

25 THE COURT: Mr. Gastel, anything further on that

1 issue?

2 MR. GASTEL: No, I think I've said my peace on that
3 issue, your Honor.

4 THE COURT: So, moving onto the second issue, and,
5 again, Mr. Gastel, what about I assume you're still arguing
6 this, the St. Thomas argument about worker's compensation
7 claims, and I guess in my limited experience, often
8 employers -- I think the plaintiffs would have to sign some
9 documents, but employers certainly could push the filing or
11:46AM 10 insurance companies will so that the plaintiff may not
11 realize that they filed a worker's compensation claim?

12 MR. GASTEL: Well, I mean, again, I think the
13 plaintiffs here are certifying under oath that they haven't,
14 and I think that sort of on the back end requiring that the
15 plaintiffs then produce a release is nothing more a fishing
16 expedition, and I think importantly here, your Honor, the
17 defendants who did these releases wouldn't even know when to
18 send them.

19 Are they going to send 50 worker's compensation
11:46AM 20 releases to every single state worker's comp. physician in an
21 attempt to try to find that one instance where the person
22 didn't remember that they filed a worker's comp. claim, in,
23 you know, 2004, and so we just think that it's sort of an
24 obvious and natural outgrowth of swearing under oath that you
25 didn't file a worker's comp. claim to then sort of be

1 required to provide a release for records that you just swore
2 didn't exist.

3 THE COURT: All right. So, St. Thomas.

4 MR. SCHRAMEK: Your Honor, as I think the Court just
5 mentioned, there are circumstances that are relatively common
6 where worker's comp. claims could get filed where the
7 plaintiff may not recall or may not have known.

8 11:47AM 10 Mr. Gastel talks about the certification. Of
9 course, we noted in there it's only to the best of my
knowledge, information and belief, hardly sworn under oath
11 that it does not exist and did not happen.

12 11:48AM 20 With respect to which states to go file it in,
13 first, that's an issue, a decision and a burden on the
14 defendant to decide where they want to go look for those
15 records. I think in most cases, given what we know about the
16 plaintiffs and their work history from the plaintiff profile
17 forms, there will be one state, which we would likely need to
18 pursue that filing, so we would simply ask that it's not a
19 burdensome procedure, the plaintiffs are already signing
authorizations and filling out a lengthy form. One more
signature for this very important discovery we think is
appropriate.

23 THE COURT: Mr. Gastel, anything further on that?

24 25 MR. GASTEL: No, although I will say, with my
apologies to Mr. Schramek who I assume is in the courtroom,

1 if he could speak a little bit louder into the microphone, I
2 would appreciate it, as I'm having a little bit of difficulty
3 hearing him. I believe I got the gist of what he said, and I
4 believe I've said my peace on that particular regard.

5 THE COURT: So, item Number 3, it appears that we
6 have agreement, but the parties would just like me to add
7 that to any order that I might issue.

8 So then moving onto item Number 4, and my question
9 to the PSC is why shouldn't I adopt UniFirst's proposal? It
11:49AM 10 does seem to me that some of these questions are key
11 questions in the litigation, and, again, after two plus
12 years, it would seem that the plaintiffs should know the
13 answers to these questions, but that UniFirst's proposal
14 seemed like a reasonable compromise.

15 MR. GASTEL: Well, I guess my problem with the
16 UniFirst proposal, on some level, part of the mechanics of it
17 is I think that the plaintiffs have more or less already sort
18 of promised that they've done the reasonable diligence in
19 answering the forms under oath.

11:49AM 20 If they simply don't remember the answer to a
21 question that is presented only as yes or no or they simply
22 don't know the answer to that, it seems reasonable to allow
23 them to say I don't know, especially since they're swearing
24 to these forms under oath.

25 With regard to saying that I'm not entirely sure how

1 we implement UniFirst's suggestion that they then -- do they
2 also need to certify that they've undertaken a reasonable
3 diligent review of the records at hand on top of swearing
4 under oath?

5 I mean, that seems kind of unreasonable and
6 unworkable in this situation, and that would be our only sort
7 of response to this, to the UniFirst proposal.

8 THE COURT: All right. St. Thomas.

9 MR. SCHRAMEK: Your Honor, of course, part of the
11:50AM 10 plaintiff profile process was having the defendants pursuant
11 to these Court orders forego discovery from plaintiffs at
12 this time in lieu of actually having them at a deposition,
13 sending interrogatories where we could follow up on some of
14 these questions, when we got a "I'm not sure," "I don't
15 remember," and we could press them at deposition, well, let's
16 talk about your medical history, et cetera.

17 When you look at a question such as -- I'm trying to
18 speak into the microphone -- when you look at a question like
19 "Have you ever been told that your injuries were caused by an
11:51AM 20 exposure to an NECC product," I just don't understand how an
21 unknown is ever appropriate to that question. Either they
22 were told or they weren't told.

23 Your Honor, if I could be frank with the Court, what
24 I think is happening is that a lot of the plaintiffs are
25 sending these forms to their clients, getting them back in

1 the mail with inappropriate answers, and instead of following
2 up with their clients to get the yes/no answer and get it
3 revised, they just forward it on, and so it's really a burden
4 issue of not getting the answer when it's a yes/no answer as
5 opposed to unknown being actually an appropriate response.

6 "Are you claiming that NECC made previous conditions
7 worse? Yes or no."

8 "Did you have previous conditions that got worse?"

9 Either you did or you didn't. These are basic yes/no
11:52AM 10 questions that we think that the plaintiffs should be
11 required to answer in order to forego discovery.

12 We're going to be talking about in a couple months
13 or so about a Bellwether selection process, about selecting
14 cases, and plaintiffs based on these forms, and these are
15 very important questions about how we likely would categorize
16 the different groups and select persons for further
17 discovery, so we would ask them simply to answer the
18 question, and if the plaintiffs' attorneys have to follow up
19 with their clients to figure out if it's a yes/no, to give
11:52AM 20 them legal advice as to whether yes or no is the better
21 answer, then, your Honor, that needs to happen, and that
22 needs to happen now.

23 THE COURT: Mr. Braceras, do you wish to add
24 anything to this?

25 MR. BRACERAS: Your Honor, we largely are in

1 agreement with St. Thomas. We think, as we indicated in the
2 brief, that there are certain answers where the plaintiffs
3 are answering unknown where they are obvious questions, so
4 they should be required to exercise some diligence in finding
5 out, it's just not whether you know your driver's license.

6 MS. CARROLL: Hello, we're having a hard time
7 hearing you.

8 MR. BRACERAS: It should be knowable to get your
9 driver's license or health insurance policy, and we agree
11:53AM 10 with St. Thomas that some of these answers do not warrant an
11 unknown response.

12 THE COURT: All right. Mr. Gastel.

13 MR. GASTEL: First of all, I very much disagree with
14 Mr. Schramek's characterization that the plaintiffs aren't
15 doing due diligence on these forms. Obviously, I can't speak
16 to every plaintiff's counsel in this litigation, but I was
17 very actively involved in putting together many of the forms
18 my office did, and I can assure you when a question comes in
19 that is unknown or I don't know or something of that, it is a
11:53AM 20 little bit off-base from the form, there's definitely a
21 process, and we and plaintiff's attorneys take very seriously
22 the need to ensure that these forms are filled out to the
23 best ability of our clients, and the fact that we're just
24 getting them in, not looking at them and sending them to
25 defense counsel I think is just simply wrong.

1 With regard to some of the points, other points that
2 Mr. Schramek made, you know, going to back to the point of
3 whether or not they were told that their problems were from
4 an NECC product, many of these people are filling out this
5 form two years after these conversations with their doctor.

6 Now, I think that it's fair in the instances where
7 somebody doesn't genuinely remember whether or not their
8 doctor said in the room two years ago that yes, this is
9 definitely caused by an NECC product or no, this is not
11:54AM 10 caused by an NECC product, memories fade, and here we are in
11 many instances two, two and a half years after these
12 conversations took place, and I think that it's purposefully
13 within a plaintiff's right to swear under oath that they
14 simply don't remember what that doctor said or didn't say in
15 the room that day, and that goes to many of the other
16 questions.

17 Now, Mr. Braceras pointed out the driver's license
18 issue. I will admit that in some instances that, you know,
19 plaintiffs should be able to pull out a driver's license and
11:55AM 20 figure out what their license number is, but with that being
21 said, what if somebody doesn't have a driver's license, is
22 that the basis for them swearing under oath that they don't
23 know it?

24 So, again, you know, I think that there's tremendous
25 benefit in having the plaintiff profile form sworn to under

1 oath. It's sort of imposes upon the plaintiffs and
2 plaintiff's counsel a tremendous burden to ensure that those
3 forms are filled out to the best ability possible, and we
4 think that plaintiffs, if unknown is the truthful and correct
5 answer to a question, should be able to fill that in. That
6 would be the plaintiff's steering committee's position on
7 that issue.

8 THE COURT: Ms. Johnson.

9 MS. JOHNSON: Thank you, your Honor. Two quick
11:56AM 10 points: As a procedural matter, plaintiffs' profile forms by
11 and large have all been served already. Now, there may be
12 some new cases in the last 30 or 60 days, I forget, where
13 that's not yet the case, but for the vast majority of
14 plaintiffs in the MDL, efforts have been made to complete
15 that form thoroughly after doing reasonable diligence with
16 the attorney and the plaintiff in consultation taking very
17 seriously the wording of that form and the obligations
18 attended to that and the requirement that you're signing, I
19 think it's not under oath, that's true, but it does require
11:56AM 20 to the best of your knowledge.

21 I mention the fact that this has been done for two
22 reasons:

23 First, to the extent the Court would require
24 additional waivers on the worker's comp., that would be
25 another round of this process that we would have to engage

1 in, as many plaintiff's attorneys did not submit worker's
2 comp. waivers with I think at least at the time the
3 understandable reading of the Court's order that that may not
4 be necessary if you're not claiming worker's comp.

5 Second, I mention it because I think, in fact, at
6 least in my experience with my plaintiffs and the plaintiffs'
7 lawyers I've spoken with, UniFirst's suggestion here has been
8 implemented, meaning plaintiffs and their counsel have
9 exercised reasonable diligence and reviewed the materials in
11:57AM 10 their possession and made a serious effort to answer these
11 questions honestly.

12 I don't want to waive the victim flag too wildly,
13 but I think it is worth remembering that many of these folks
14 were seriously ill and hospitalized for long periods of time
15 with brain infections. Not everyone's memory is critical
16 clear, and I would suggest in a circumstance, you know, a
17 plaintiff may well decide the answer is I'm not sure, I just
18 don't remember that well, so....

19 THE COURT: And so that in some way may answer my
11:58AM 20 next question. Do you have an idea of the percentage of
21 people that answered unknown to the subject questions, like a
22 ballpark figure?

23 MS. JOHNSON: I do not, your Honor.

24 THE COURT: All right. Because it strikes as we're
25 talking, and I know these were heavily litigated, and there

1 was litigation over that perhaps, so, for example, 34 may be
2 a poorly worded question, right, "Have you ever been told,"
3 right, rather than just asking are any of your injuries,
4 right, and then you could say on what basis?

5 So my next suggestion was whether to ask that
6 question, but you're saying, I would gather, from the
7 plaintiffs' perspective, you don't want a new question to go
8 out?

9 MS. JOHNSON: If the Court were talking about
11:58AM 10 modifying the plaintiffs' profile forms so that newly filed
11 cases or plaintiffs who have not yet completed it are
12 answering a slightly more clear question, I don't think the
13 PSC would have an objection to that, but we would not suggest
14 that it would be appropriate here to ask all the plaintiffs
15 to answer additional questions at this point.

16 THE COURT: All right.

17 MS. JOHNSON: I should also, just as a procedural
18 matter, your Honor, there's also an opportunity for
19 defendants who receive plaintiff profile forms to alert the
11:59AM 20 plaintiff and his counsel, if he has counsel, to
21 deficiencies, and my understanding is that we have received
22 deficiency notices identifying, for example, where a driver's
23 license is missing or a name is not filled in, and plaintiffs
24 and their counsel are working to address those.

25 THE COURT: Yes.

1 MR. SCHRAMEK: And, your Honor, we have with
2 diligence every plaintiff profile form we have received, we
3 have sent a letter saying when it didn't contain a worker's
4 comp. form, for example, authorization, we've sent it and
5 said there is a deficiency, and we do need that worker's
6 comp. form.

7 With respect to the yes/no questions, unknown really
8 provides no information. It doesn't mean are you saying yes,
9 no, or are you saying you don't remember, are you saying,
11:59AM 10 well, I recall someone may have said that, but I can't...
11 There's so many possibilities there, so, 1, we believe yes/no
12 continues to be appropriate.

13 To the extent that the Court concludes that maybe
14 there's another third alternative, we would ask for an
15 explanation. If it's you can't remember ever being told
16 that, let's have that. If it's I think someone said it, but
17 I can't swear to you, I think my doctor said it, but I just
18 don't remember for sure, that's an explanation. That's not
19 one word "unknown" leaving us in the dark as to what that
12:00PM 20 really means.

21 THE COURT: All right. So I understand the PSC's
22 argument that they don't want to go back and redo forms, but
23 I understand that. What about St. Thomas's suggestion to
24 explain the unknown?

25 MS. JOHNSON: I would suggest, your Honor, that my

1 understanding -- let me back up a minute. There has been an
2 assumption in this MDL from the beginning that eventually we
3 would be getting into Bellwether cases and cases that we
4 worked up for individual discovery once we had a trial pool
5 of sorts and a plan for moving forward with that.

6 I would suggest given the reality that plaintiffs
7 have already completed these forms and that we'd like to not
8 ask them to do so again, it may be appropriate for defense
9 counsel to probe any unknowns or questions, answers that
12:01PM 10 they're not satisfied with to the extent they can't be cured
11 now, at the point in time where we're working up that
12 individual case for trial.

13 THE COURT: All right. Anything further on this
14 motion?

15 (No response)

16 THE COURT: All right. So we'll move on. The next
17 one I have is the PSC's motion to compel, and this involves
18 both the motion to compel -- well, I have to ask some
19 questions about it, a formulary and an index of policies.
12:01PM 20 Who's going to speak for the PSC on that?

21 MR. GASTEL: That is another thing that I am arguing
22 on behalf of the PSC today, your Honor.

23 THE COURT: All right. So my first question is I am
24 confused because the motion and the memorandum switch back
25 and forth as to which entity the materials are requested

1 from, so, for example, in the motion that says the St. Thomas
2 Hospital formulary but in the memo it seems to seek a broader
3 request, and the same problem I had with the index, at one
4 point, the papers say all St. Thomas entities, the motion
5 says just said St. Thomas Hospital, and another document says
6 St. Thomas Health, so what are you seeking from whom?

7 MR. GASTEL: Well, I could be corrected if I'm wrong
8 on this by counsel for the St. Thomas entities, but I believe
9 that the St. Thomas entities do not maintain a formulary
12:02PM 10 per se applicable to its host of medical facilities, so with
11 regard to the formulary, it's really the St. Thomas Hospital
12 formulary, which, you know, I believe it would also be in the
13 possession, custody and control of all of the St. Thomas
14 entities.

15 The same thing can go for the index. We're looking
16 for an index of policies that are applicable on the
17 St. Thomas Hospital campus, which, again, should be in the
18 possession, custody and control of all of the St. Thomas
19 entities.

12:03PM 20 THE COURT: All right. Then so why are the redacted
21 portions of the St. Thomas Hospital formulary relevant? As I
22 understand it, and you can correct me if I'm wrong, the
23 plaintiffs that are associated with these defendants were all
24 treated at I think some people refer to it as the STOPNC, the
25 clinic, and then I understand there's also a relationship

1 between the clinic and the hospital and that you have the
2 STOPNC formulary, and you have a redacted St. Thomas Hospital
3 formulary.

4 Why do you need the rest of the drugs on the
5 St. Thomas Hospital formulary?

6 MR. GASTEL: Sure. So plaintiffs allege in part
7 that the St. Thomas entities failed to adequately supervise
8 its agent, the St. Thomas Clinic, or as you just described
9 them, STOPNC, which is the acronym for the St. Thomas
12:04PM 10 Outpatient Neurosurgical Clinic, which is the clinic that is
11 on I believe the ninth floor of the St. Thomas Hospital
12 building.

13 It's the clinic where these plaintiffs received
14 their injections in that the plaintiffs here are alleging
15 that the St. Thomas entities fail to adequately supervise
16 that agent to ensure that it purchased safe medicines for its
17 patients.

18 The St. Thomas entities, specifically the St. Thomas
19 Hospital, maintain a list of medications that it believes are
12:05PM 20 safe and effective in treating patients in their hospital,
21 and this motion simply asks that the St. Thomas entities
22 produce that policy, and the relevancy of --

23 THE COURT: Wait, my question was about the
24 formulary.

25 MR. GASTEL: Sure. I apologize, but the formulary,

1 the St. Thomas entities claim that the formulary does not
2 contain a reference to compounding medications, but to the
3 extent that the formulary doesn't actually list compounding
4 medications, it's still relevant to plaintiff's claims in the
5 sense that that suggests that the St. Thomas entities, and
6 specifically the St. Thomas Hospital, understand that the
7 safety protocol associated with purchasing a compounding
8 pharmaceutical is different than its FDA-regulated
9 equivalent.

12:06PM 10 THE COURT: Right. But you don't get that from the
11 formulary, you get that from testimony about the formulary,
12 and they've offered to stipulate or respond to a request for
13 an admission that the STH formulary did not make any
14 reference to compounded products.

15 Why from an evidentiary purpose you get what you
16 want about the formulary with respect by their offer of a
17 stipulation or a request for admission?

18 MR. GASTEL: Again, I don't necessarily think that
19 we can understand the full scope of that without seeing the
12:06PM 20 entire formulary because the idea that it doesn't simply
21 reference compounding medications is not sufficient, and to
22 the extent that other medications that could appear on that
23 formulary, you know, they could appear in terms of -- so the
24 formulary as it's shown provides the name, the generic name
25 and the name brand of the FDA-regulated brand name of the

1 drug and the sort of dosage and type of drug that it is, so,
2 for example, you know, a 32 milligram pill of
3 methylprednisolone is on the portion of the formulary that
4 they've produced.

5 Now it could be that that 32 milligram tablet is
6 available through the brand name equivalent, but it's also
7 possible that the only way to get a 32 milligram tablet is to
8 compound it, if you will, or to dilute it in some form, and
9 so merely by saying that the formulary doesn't reference
12:07PM 10 compounding medications, although it might be true enough
11 that it doesn't say 32 milligram compounded, it is still
12 relevant to the extent that it sort of shows a preference for
13 only purchasing those drugs that are available through a
14 generic or a brand name equivalent.

15 We can't really know the universe of instances where
16 the St. Thomas entities or St. Thomas Hospital believes that
17 a compounded drug without sort of going through a separate
18 safety protocol is appropriate without seeing the entire list
19 of medications, the entire universe of medications that it
12:08PM 20 says here are the ones that are safe to use in the hospital,
21 you don't have to do anything else, you can just go purchase
22 them, so that's why we believe that the entire formulary is
23 necessary because it provides a picture, a window into those
24 instances where and it might be in no instances, and it might
25 be some instances where the St. Thomas Hospital thinks it's

1 okay to purchase the compounded medication and some instances
2 where it doesn't think it's okay to purchase the compounded
3 medication, and there's this other safety mechanism and
4 safety protocol that you have to follow to ensure that the
5 drugs that you're purchasing are safe.

6 THE COURT: All right. Thank you.

7 MR. GASTEL: That's highly relevant to claims
8 involving the claims where you fail to follow the safety
9 protocols to ensure that you purchased a safe compounding
12:09PM 10 drug that was eventually injected into its patients, so
11 that's one instance.

12 The second instance is that the unilateral redaction
13 hardly covers the realm of medications that are relevant in
14 the lawsuit in the sense that the availability of safer
15 FDA-regulated alternatives to NECC compounded MPA is highly
16 relevant to plaintiffs' claims, so if the hospital formulary
17 provides that the use of dexamethazone or other
18 corticosteroids, the existence of those FDA-approved
19 alternatives on the hospital's formulary would be highly
12:09PM 20 relevant to plaintiff's claims, as it would allow them to
21 point to readily accessible alternatives to the dangerous
22 drugs that the St. Thomas Clinic ultimately purchased from
23 NECC and injected into its patients, and so that is why we
24 sort of believe that the unilateral redactions are
25 insufficient and that we should be able to be given a window

1 into the entire formulary in order to be able to fully
2 investigate how the St. Thomas Hospital treated and saw the
3 safety of compounded drugs in relation to their FDA-regulated
4 drug equivalents.

5 MR. SCHRAMEK: Your Honor, Adam Schramek for
6 St. Thomas. I think you've now heard how our meet and confer
7 went essentially over this issue. We start with the concept
8 of STOPNC, which is in a medical plaza building with
9 third-party tenants and doctors and surgery centers, not
12:10PM 10 St. Thomas Hospital.

11 STOPNC has its own formulary. A couple of weeks
12 ago, we took the deposition of Ms. Schamberg who's the head
13 and director of STOPNC. We have the STOPNC formulary.
14 STOPNC is the actual entity that provided the injections.
15 Not one injection of compounded MPA from NECC was performed
16 at the hospital.

17 So we start with that issue, and from St. Thomas
18 Hospital's point of view, we don't believe our formulary is
19 even relevant to this issue. It's uncontroverted what the
12:11PM 20 formulary was for STOPNC, and they have all the policies with
21 respect to the STOPNC formulary and now have the sworn
22 testimony of Ms. Schamberg as to whether the MPA from NECC
23 qualified for their formulary or not, which is the real issue
24 of relevance.

25 So taking one step back from direct relevance and

1 now going on what we would argue is a fishing expedition,
2 they want to go look at the formulary for the hospital.
3 Well, originally, your Honor, we said no, it's not relevant
4 and stood on the objections I just told you, but not wanting
5 to have to come here, wanting to try to work together,
6 wanting to try to get the discovery that reasonably
7 potentially could be relevant, we decided to give them the
8 unredacted portions of our formulary with respect to the drug
9 that is I don't think anyone disagrees the only drug at issue
12:12PM 10 in this litigation, methylprednisolone.

11 We gave them those portions, and, importantly, we
12 also gave them all of our policies and procedures with
13 respect to how you get something on the formulary, how you
14 buy off formulary. The entire gamut of drug selection
15 process, we gave that to them as well as these relevant
16 portions from the formulary.

17 The Court asked Mr. Gastel why is it that the other
18 drugs on that formulary are relevant, and I would propose to
19 the Court, we did not hear an answer because it's not.
12:12PM 20 Whether or not this formulary has Tylenol, Tylenol 3 with
21 Codeine, Advil, acetaminophen, who cares, your Honor,
22 honestly, who cares?

23 The formulary for a hospital is going to have a wide
24 array of drugs for every possible emergency condition that
25 could come through the door on a Friday night. That has

1 nothing to do with the limited one type of corticosteroid
2 that was used at a clinic in a medical building that happens
3 to be by the hospital.

4 Your Honor, it's completely irrelevant. We think
5 we've gone above and beyond. We've given and given, but
6 we're simply to the point to the entire formulary, there's no
7 relevance to the issues in this case.

8 THE COURT: All right. Mr. Gastel, anything further
9 on the formulary?

12:13PM 10 MR. GASTEL: Can I address just briefly very quickly
11 this idea that the St. Thomas Clinic is separate from the
12 St. Thomas Hospital? That is their theory. Our theory is
13 that they're not, that this was a joint venture between the
14 hospital and the Howell-Allen Clinic, of the other owner of
15 this clinic.

16 We've seen documents that suggest that this is a
17 joint venture, and under Tennessee law, you have an
18 affirmative duty to supervise the actions of your agents in
19 that joint venture to ensure that they're carrying out their
12:14PM 20 legal duties, and so to sit there and say that the hospital
21 formulary is somehow not relevant to that claim simply mis --
22 it's simply adopting the defendant's theory of this case and
23 ignoring the plaintiffs' theory of this case, and obviously
24 that's not how discovery works.

25 We get discovery over all matters that are

1 reasonably calculated to lead to the discovery of admissible
2 evidence, and if our theory holds up, then the hospital
3 formulary is highly relevant to the actions of their agent.

4 When Ms. Schamberg realizes she needs to purchase
5 drugs from a different supplier, she doesn't pick up the
6 phone and call all of the people who are at St. Thomas
7 Hospital who have robust knowledge about this process, she
8 just willy-nilly picks up the phone and calls NECC.

9 On the flip side, when the hospital administrator,
12:15PM 10 or, I'm sorry, the clinic administrators sort of realize
11 after the aftermath of this tragedy that they need public
12 relations help and they don't have the expertise in dealing
13 with the media, who do they call, they don't call an outside
14 independent public relations firm, they call the public
15 relations firm inside the hospital, and the hospital happily
16 provides those services to the clinic.

17 So that's what happened on the back end of this
18 tragedy. What we did to investigate is what should have
19 happened on the front end, and that's why we think the
12:15PM 20 hospital formulary is highly relevant to these claims because
21 these entities are in fact not separate entities. The clinic
22 is clearly the agent of the hospital, and we get to
23 investigate how they supervised that entity, and part of that
24 supervision should be why didn't you communicate to that
25 clinic what you believed were safe drugs to be using in

1 patients. That communication never took place, or at least
2 it doesn't appear in the record that it ever took place, and
3 that compromised patient safety and the clinic where these
4 people were ultimately injured.

5 MS. JOHNSON: Your Honor has some help on this from
6 Judge Zobel as well in terms of competing theories in that
7 Judge Zobel as already denied St. Thomas Hospital and
8 St. Thomas entities' motions to dismiss and allowed the
9 plaintiff's claims to survive on both agency and direct
12:16PM 10 negligence theories as against St. Thomas Hospital. You also
11 heard Mr. Gastel mention there's some evidence now I gather
12 maybe joint venture theories are appropriate here.

13 This isn't a situation, your Honor, where St. Thomas
14 Clinic and St. Thomas Hospital hold themselves out as one
15 entity. Their slogan is "One Name, One Healing Community,"
16 right? So I think some of that may be helpful to the Court
17 in deciding this issue.

18 In terms of the formulary itself, I mean, it's
19 binary. The formulary for the hospital either does or does
12:17PM 20 not list compounded medications. As Mr. Gastel points out,
21 it may be that it does list compound medications but that
22 it's not immediately observable without a little poking and
23 prodding and research to determine that that medication is
24 compounded, and if that formulary and the redacted portions
25 do not list compounded medication, speaking strictly with my

1 trial attorney hat on, your Honor, I would always rather have
2 the 100-page formulary that does not list any compounded
3 medications rather than a one-page stipulation to that
4 effect.

5 MR. SCHRAMEK: And, your Honor, first of all, you
6 know, the advertising campaign that I keep mentioning
7 happened after the outbreak, so not one patient ever saw that
8 "One Healing Community" ad campaign.

9 Putting that aside though, it's because of the fact
12:18PM 10 the agency issue did not survive on the pleadings, a motion
11 to dismiss, and has gone to discovery that we produced all of
12 the hospital's policies and procedures relating to
13 procurement, relating to adding things to the formulary and
14 taking things off, and ultimately produced the formulary
15 lines with respect to methylprednisolone.

16 Again, I have yet to hear one argument as to why it
17 matters whether any of the other drugs or what the other
18 drugs are that have not been produced. It's completely
19 irrelevant, and it's a complete fishing expedition. We've
12:18PM 20 offered to stipulate it, and, again, we've given them the
21 lines, the drugs at issue. There's simply no relevance.

22 THE COURT: And what about so if I understand
23 correctly the formulary that you did, the redacted formulary
24 from St. Thomas Hospital, so and I think I'm just asking if
25 I'm stating this correctly, it does not contain all the

1 compounded medications that might be on there?

2 MR. SCHRAMEK: Your Honor, a compounded medication
3 is nothing but a generic medication that a pharmacist has
4 taken and put into a different type of process to be used to
5 a particular patient. If you can't take the tab, you break
6 it up into a solution and you can inject it, so the formulary
7 is saying what are the approved types of drugs for use at the
8 hospital, and we gave them the heading so they can see what
9 are the other columns, and one column is brand name, and when
12:19PM 10 we get to the discovery on the formulary, which they'll be
11 able to ask all these questions to a witness with what we've
12 given them, all the relevant parts, they'll understand that
13 the reason you put the brand name there is because that's
14 just another piece of information that the doctors and
15 pharmacists use and rely upon.

16 Instead of saying acetaminophen, we say Advil.
17 Well, everybody knows you can go to Target and get Advil or
18 you can get generic, you can get acetaminophen, Tylenol. You
19 know, it's simply what are the approved drugs for the
12:20PM 20 hospital, and, again, as far as how do you go buy that
21 acetaminophen, what is the exact brand name you might get,
22 that's when you go to your GPO, your group purchasing
23 organization. That's like your warehouse, and you go I need
24 acetaminophen, and they've already have them for you to pick
25 from and go I'll take this one, I'll take that one, so

1 they're trying to turn this formulary into something relevant
2 to compounding when it simply is not.

3 MS. JOHNSON: I feel constrained to make two points
4 in response because, frankly, I'm so much shocked by
5 Mr. Schramek's comments. The first, that a compounded
6 medication is "just a generic medication" belies some of the
7 fundamental problems at issue with St. Thomas Hospital and
8 other clinics approached to purchasing drugs in this case.

9 The FDA has just issued new guidance on compounding
10 within the last I want to say week, maybe three days.

11 Compounded drugs are not just generic drugs.

12 Second point: Mr. Schramek's comments seems to me
13 to suggest that what may be the case on a formulary is that
14 St. Thomas Hospital is listing the brand name medication and
15 a generic name medication, but, in fact, the product that the
16 hospital is suggesting be dispensed or is in fact dispensed
17 is in fact a compounded product.

18 Now, your Honor, one of the issues in this case, and
19 I can't speak specifically to the Tennessee example because I
20 don't have Tennessee plaintiffs, and I'm less familiar with
21 that, I'm sure Mr. Gastel can chime up, but one issue in this
22 case is that many patients were told they were getting the
23 brand name product when, in fact, they were getting a
24 compounded product.

25 The fundamental difference between those two is that

1 the FDA approves brand name and generic products, and the FDA
2 does not approve compounded products, so one of the issues
3 here, and, again, I'm not pegging this on St. Thomas
4 necessarily, but one of the allegations is that some clinics
5 and doctors dispensed compounded products and told their
6 patients they were brand names, so Mr. Schramek has now just
7 given me an additional argument for why providing this
8 formulary is so important here.

9
12:22PM 10 MR. SCHRAMEK: And, your Honor, I would like to
point out the fact that clearly this incident has created an
11 entire new plaintiff's theory that really ignores reality.
12 Compounding is nothing but a pharmacist who's approved and
13 regulated by a Board of Pharmacy by a state who can take a
14 prescription and a medication and turn it into another form.

15 Why would you put that on a formulary if a patient,
16 if it needs a particular, let's say a cream, they want a
17 cream, and they want to dilute the cream, you would take that
18 to a pharmacist who would dilute the cream and then would
19 give it to you.

12:22PM 20 The idea of what a formulary is versus what the
21 practice of compounding is are two different things, and, of
22 course, they're trying to mix them as part of this discovery
23 dispute, but, your Honor, we have given them all of the
24 relevant entries, and they can make all these arguments from
25 everything we've given them, and none of these arguments will

1 change or be materially advanced, prove any fact of
2 consequence more likely than not, which is supposed to be the
3 standard for relevance, none of that will change based on
4 what's been redacted because we have given them all of the
5 relevant entries and the policies on how you do something
6 that doesn't match one of the relevant entries by
7 off-formulary.

8 THE COURT: All right. Thank you. Moving onto the
9 policies, so, again, Mr. Gastel, I don't know if you're
12:23PM 10 responding to this. I think St. Thomas had suggested, and I
11 know you all had a meet and confer, so he's probably had the
12 benefit of the argument, but I'm not sure I have.

13 They've proposed some ways to narrow the request,
14 and I think in terms of relationships, policies that might
15 bear on the relationship or contain definitions of the
16 entities, so why isn't that acceptable to the PSC?

17 MR. GASTEL: Well, again, we're sort of back into a
18 corner here where we're trying to defend the relevancy of
19 information that we don't necessarily know exists or doesn't
12:24PM 20 exist, so --

21 THE COURT: But the request I think you've
22 acknowledged was broad, right, I think it asked for all
23 policies and procedures?

24 MR. GASTEL: Yes, and as a middle ground, to the
25 extent that they didn't want to produce all policies and

1 procedures, we offered to simply say, well, you know, all
2 hospitals maintain an index of your policies and procedures,
3 just produce that index, and we can sort of then have a
4 better understanding of the types of policies that we might
5 think are relevant to the claims, not only the drug
6 procurement side of the equation, but also the sort of agency
7 and vicarious liability side of the equation, and even on the
8 drug procurement side, I want to correct some things that
9 Mr. Schramek has said.

12:24PM 10 He has made continual references that they have
11 produced all of the policies related to procurement, but in
12 the limited policies that they've produced, it references 13
13 other policies and procedures, one, of course, is the
14 formulary that we're fighting about today, and to my
15 knowledge, not all of those 13 policies and procedures have
16 been produced in this litigation, and so that's why the
17 indexes is particularly helpful in this because it lists all
18 of those policies, whether or not they're just procurement
19 policies or those types of ethical policies which we attached
12:25PM 20 to our motion, which are obviously relevant because it's a
21 flat-out admission by the St. Thomas entities that they
22 directly and indirectly control other entities that are not,
23 you know, the same corporate entity as the St. Thomas
24 Hospital or St. Thomas Health or St. Thomas Network, and so
25 that's why we think that the index is an appropriate middle

1 ground to allow us to sort of have the deeper discussion as
2 to what policies or procedures should be produced in this
3 litigation.

4 I think alternatively, you know, the Court can
5 compel them to produce all of their policies, although, you
6 know, we understand that that might be a little bit of an
7 overreaching because if there's a policy as to, you know,
8 what bathrooms that the janitor needs to clean first on the
9 first floor, we don't need that policy, but those procurement
12:26PM 10 policies, we definitely need, the policies like the ethical
11 policy that we already produced with our papers, you know, to
12 show those agency relationships, those policies are the ones
13 we are after.

14 We could very easily sort of look at an index and
15 find out and look and determine what policies we think are
16 relevant to that document request, and then we can sort of
17 have the deeper discussion as to whether or not they should
18 be produced, but it's a middle of the road, it's a very sort
19 of routine thing that is given in medical malpractice cases
12:26PM 20 in the State of Tennessee, and we think that it should be
21 produced here.

22 I want to briefly, very briefly touch on the fact
23 that the St. Thomas entities in their papers, they cite to
24 three cases where these types of indexes aren't produced. We
25 think that those are all wholly distinguishable to our 1983

1 pro se prisoner cases. We think that those are obviously
2 distinguishable on their face, the medical malpractice case,
3 such as this one, and the third one is a police brutality
4 case where some of the information in the index was withheld
5 under the sort of qualified privilege not to reveal police
6 tactics.

7 Obviously that type of holding is not relevant to
8 what we're seeking in this case, and so we think that those
9 cases are wholly distinguishable and not relevant to the
12:27PM 10 Court's decision.

11 MR. SCHRAMEK: Your Honor, we hear about this middle
12 of the road approach and how it's done all the time, and yet
13 when I asked the PSC for one case that would show that this
14 is an appropriate case, I didn't get any, and so I did my own
15 legal research and found out that the only cases I could find
16 where any plaintiff even attempted to make a request for an
17 index of everything were prisoner 1983 cases in which the
18 Courts soundly rejected that request, not under any reason
19 other than as inappropriate, overly broad and not relevant
12:28PM 20 under the Federal Rules of Civil Procedure.

21 That decision was made by the Western District of
22 Pennsylvania, by the Eastern District of Arkansas, by the
23 Eastern District of Michigan using language such as a blatant
24 fishing expedition, overly broad and not reasonably tailored.
25 If Mr. Gastel wants to have a discussion about procurement

1 policies, if he thinks there's one we overlooked or didn't
2 produce, he has my number, we will have that conversation
3 whenever he calls, and if I missed something, he will get it
4 the next day because we have no problem turning over the
5 relevant policies and procedures and the relevant
6 information, but what Mr. Gastel and the PSC wants to do is
7 to conduct a fishing expedition into all of the policies.

8 He even admits that this index would be something
9 that would cover things like sick days, making cash deposits
12:29PM 10 or box, training coverage for ER personnel. What does that
11 have to do with this litigation? Nothing.

12 The way document requests are supposed to work is he
13 defines the type of policies and procedures he's looking for,
14 we go look for them and we produce them, and that's what the
15 cases we cited said has to happen.

16 We have worked to provide the relevant ones.
17 There's going to be depositions occurring. He's going to get
18 to ask about policies that might be unwritten, but as far as
19 the ones that are written done and that are hospital policies
12:29PM 20 that are relevant to this litigation, we'll produce those,
21 but, your Honor, we have to draw the line in a fishing
22 expedition.

23 MR. GASTEL: And I'm very happy to have that
24 conversation with Mr. Schramek, but in order to do so, I need
25 to know what policies exist in order to have a conversation

1 about what ones we think need to be produced.

2 MS. JOHNSON: Your Honor appropriately challenged me
3 about two weeks ago when I was before you on another matter,
4 and you appropriately asked me whether I thought defendants
5 would pay defense counsel to indulge their curiosity or go
6 off on fishing expeditions, and you were right to do so
7 because I don't think they will, but what I know is that the
8 plaintiffs' steering committee and the plaintiffs' attorneys
9 representing these Tennessee plaintiffs are not going to go
12:30PM 10 off indulging in their whims here if they didn't think there
11 was a reason it was necessary. It's an index, your Honor.
12 It's an index. This is not burdensome on the defendants, it
13 potentially leads to relevant discoverable material, and we'd
14 leave it at that.

15 THE COURT: All right. Anything else on this topic?
16 So I have reviewed in camera the trust agreement. I'm just
17 looking at my questions. I don't think a review of the
18 document changes my view under Rule 26. Rule 26 and the
19 automatic disclosures calls for production of an insurance
12:31PM 20 agreement under which an insurance business may be liable.

21 Reviewing the trust agreement does not change my
22 opinion that the trust itself is an insurance business. If
23 that's correct, and doesn't that mean it's not subject to
24 mandatory disclosure, or does the PSC still get it?

25 As I see it, there are two components to it that

1 were in play, whether it's an insurance agreement, and I
2 think the parties have very different views as to what --
3 frankly, I think it falls in between.

4 There's a whole body of case law on self-insurance,
5 and then there's regular old insurance, and it seems to me
6 this falls somewhere in between, but if it's not from an
7 insurance business, does that mean that it's not discoverable
8 at this stage?

9 MS. JOHNSON: I don't believe that the parties have
12:32PM 10 briefed that issue, your Honor. I would suggest that it may
11 be appropriate to give us a short, short, opportunity to do
12 that, as that may be helpful in your Honor making her own
13 decision.

14 MR. SCHRAMEK: Your Honor, I can answer the question
15 as far as from the St. Thomas point of view because of the
16 fact I do think our briefing covered that issue because, one,
17 under Rule 26 to require, to qualify for automatic
18 disclosure, you have to meet every requirement. It has to be
19 an insurance agreement from an insurance business, and we had
12:32PM 20 the decision already, so if we start with the proposition it
21 doesn't qualify under their correct, the next question
22 becomes is it discoverable under a normal document request.
23 You don't have to automatically produce it, it's not
24 required.

25 Well, that's where I think we get into the issue of

1 Rule 26 is a very narrow exception to the rule that you do
2 not get financial information about how you might collect
3 against a judgment until post judgment, so Rule 26 was carved
4 out of a very narrow part of that, so now if we get to the
5 issue of a document request, 1, there is no document request
6 that would cover the trust, but assuming that they decided to
7 send one, we would be right back here arguing the issue of
8 until you have a judgment, you don't get post judgment
9 discovery until the assets of the defendant's, and a
12:33PM 10 self-insurance trust is one of those assets, just like you
11 don't get to see all of our bank accounts and all of our
12 other holdings, so, your Honor, I'd say if it's not subject
13 to the automatic disclosure, which, again, we do not believe
14 it is, it is not discoverable until after a judgment issues
15 on one case.

16 THE COURT: All right. So I can give the PSC time
17 if they'd like to respond to the insurance business.

18 MS. JOHNSON: Unless Mr. Gastel is prepared to do
19 that today, I'm not sure, your Honor.

12:34PM 20 MR. GASTEL: I'm sorry, I'm a little confused on the
21 Court's question. Are you asking whether or not if you
22 determine that it's not, if you determine that it's
23 self-insurance whether it's still Rule 26 automatic
24 disclosure, or are you asking if it's still possibly
25 discoverable through sort of a standard document request?

1 THE COURT: So there were two questions. Perhaps I
2 didn't phrase them clearly enough. One is if I find that the
3 trust participants do not constitute an insurance business,
4 is the PSC out of luck under the Rule 26 automatic
5 disclosure? As I see it, it has to meet two conditions.
6 It's an insurance agreement, and it was issued, I guess, by
7 an insurance business.

8 So if I find that it's not an insurance business
9 based on what's before me, does that mean that the PSC does
12:34PM 10 not get it under Rule 26? So that's sort of one group of
11 questions, and then the second question is even if I find
12 that it's not producible under Rule 26, does the PSC have
13 another argument?

14 I think you argued to some extent that it would be
15 relevant under other theories, but I was just asking again
16 because I think your theories were on the vicarious liability
17 is what you may have argued in the previous papers.

18 MR. GASTEL: Yes. I mean, I think to the extent
19 that it's not otherwise discoverable under Rule 26(a)(1)
12:35PM 20 initial disclosures that we believe that it could still
21 contain information that is relevant to the claims in the
22 lawsuit already.

23 So, and I think that's really the issue that we
24 would, you know, like an opportunity to brief to the extent
25 that the Court thinks or wants to entertain that type of

1 briefing at this time.

2 THE COURT: And I also had a follow-up question.
3 I'll set a schedule for the briefing in a moment, but in
4 terms of the production of the document, I understand
5 St. Thomas would object in the sense that they shouldn't have
6 to produce things that are not called for under Rule 26 in
7 terms of automatic disclosure, but when I step back from it,
8 is there other argument in terms of the harm in producing the
9 document?

12:36PM 10 MR. SCHRAMEK: Your Honor, the trust agreement is
11 something that the clients have maintained is a very
12 important document to them. It's a very important structure,
13 it's a very important part of their business, and, quite
14 frankly, given the fact this is a MDL with many different
15 plaintiff's attorneys and firms, it does not want that to be
16 freely reviewable unless and until a judgment issues, and in
17 that case, that particular plaintiff subject to a limited
18 confidentiality provision may obtain, you know, it if in fact
19 the judgment isn't -- you know, if it's appropriate at that
12:37PM 20 time.

21 So we do think it's much more than just a document,
22 and my clients, your Honor, I can tell they see significant
23 harm in simply producing this to plaintiff's firms across the
24 country as here's the St. Thomas entity self-insurance trust
25 situation, you know, here's how, you know, payments work, et

1 cetera.

2 We don't think it's appropriate, we don't think it's
3 subject to automatic disclosure, and we do think there would
4 be harm, and it's a different type of harm probably, you
5 know, that you might normally would see, but it's a very
6 important harm to my client, your Honor.

7 THE COURT: All right.

8 MS. JOHNSON: There is a protective order in place,
9 your Honor.

12:37PM 10 THE COURT: All right. So in terms of briefing,
11 when does the PSC think they could get me a brief.

12 MS. JOHNSON: I think within the week, and we would
13 suggest seven days from today rather than Friday, your Honor,
14 we would suggest that it would make sense to submit short
15 briefs on the same date if your Honor is so inclined.

16 THE COURT: I think they should have the
17 responsibility to respond to your argument, so I think it
18 would be seven days for the PSC to file any supplemental
19 brief and then seven days after that for anyone else who
12:38PM 20 wants to respond to it.

21 All right. I think that's it in front of me, or is
22 there anything else that's pending?

23 MS. JOHNSON: That's all, your Honor.

24 THE COURT: All right. So I will take these under
25 advisement, and I will see all of you perhaps later.

1 MS. JOHNSON: Thank you.

2 THE CLERK: All rise. This Court is in recess.

3 (Whereupon, the hearing was adjourned at 12:38 p.m.)

4 C E R T I F I C A T E

5

6 UNITED STATES DISTRICT COURT)

7 DISTRICT OF MASSACHUSETTS) ss.

8 CITY OF BOSTON)

9

10 I do hereby certify that the foregoing transcript,
11 Pages 1 through 46 inclusive, was recorded by me
12 stenographically at the time and place aforesaid in MDL
13 NO. 13-02419-RWZ, IN RE: NEW ENGLAND COMPOUNDING
14 PHARMACY CASES LITIGATION and thereafter by me reduced to
15 typewriting and is a true and accurate record of the
16 proceedings.

17 Dated this 20th day of February, 2015.

18

19 s/s Valerie A. O'Hara

20

21 VALERIE A. O'HARA

22 OFFICIAL COURT REPORTER

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